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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 425

SEABOARD AIR LINE RAILROAD COMPANY
ATLANTIC COAST LINE RAILROAD COMPANY, ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA, FLORIDA EAST COAST
RAILWAY COMPANY, ET AL., *Appellees.*

No. 555

INTERSTATE COMMERCE COMMISSION, *Appellant,*

v.

FLORIDA EAST COAST RAILWAY COMPANY, ET AL.,
Appellees.

On Appeals from the United States District Court for the Middle District of Florida, Jacksonville Division

MOTION TO AFFIRM AND DISMISS OF RAILWAY LABOR EXECUTIVES' ASSOCIATION, APPELLEE

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MOTION TO AFFIRM AND DISMISS OF RAILWAY LABOR EXECUTIVES' ASSOCIATION, APPELLEE

Appellee Railway Labor Executives' Association (Association), pursuant to Rule 16 of the Revised Rules of this Court, respectfully moves this Court:

(1) To dismiss the "additional questions to be presented" by the appeal of appellant Seaboard Air Line

Railroad Company (Seaboard) and appellant Atlantic Coast Line Railroad Company (Coast Line) designated as questions (a), (b) and (c) at pages 4 and 5 of the Jurisdictional Statement of said appellants on the ground that those questions are not presented to this Court in conformity to statute or this Court's Revised Rules.

(2) To affirm the decision of the lower court on the limited issue decided by it since the correctness of that decision is so manifest as to require no further argument.

QUESTION PRESENTED

The question presented is limited and clear:

Whether the court below was correct in holding that to accommodate the antitrust laws and Section 5(2) of the Interstate Commerce Act in a realistic and meaningful manner the Interstate Commerce Commission (Commission) must apply to a railroad merger the criteria developed in cases arising under the antitrust laws and then exercise its transportation expertise to determine whether in light of such applied criteria a particular merger is consistent with the public interest viewed in relation to the requirements of the National Transportation Policy and Section 5(2) of the Interstate Commerce Act [49 U.S.C. § 5(2)]?

STATEMENT

A detailed description of the appellants and appellees herein, the history of this litigation and the nature of these appeals are set forth in the motions of appellee Florida East Coast Railway Company (Florida East Coast) and Southern Railway Company (Southern) and will not be repeated here. It should be emphasized, however, that the court below did not restrict

the Commission's discretion to approve railroad mergers under Section 5(2) (242 F. Supp. at 21) but merely required the Commission to apply measurable statutory criteria and to set forth sufficient findings based upon the application of those criteria in the exercise of that discretion. (242 F. Supp. 22.)

ARGUMENT

1. THE "ADDITIONAL QUESTIONS" PRESENTED BY APPELLANTS SEABOARD AND COAST LINE SHOULD BE DISMISSED

Appellants Seaboard and Coast Line concede, as does appellant Commission, that but one question is presented for determination by this Court on their appeals. Yet the appellant railroads inform this Court that they will present to it certain additional questions should jurisdiction be noted. Two of the three additional questions were not passed on by the court below and the third indicates that the appellant railroads would ask this Court to "reverse" the lower court on issues which it did not consider in holding invalid the orders of the Commission.

Aside from the rather obvious lack of logic inherent in the railroads' attempt to secure reversal of nonexistent rulings of the lower court, the additional questions raised by the appellant railroads run afoul of the statutory jurisdiction of this Court and the requirements of its Rules.

A. Lack of Statutory Jurisdiction

The appellee Association filed with the court below an intervening complaint which contained a cause of action against the United States and the Commission entirely separate from those brought by Florida East Coast and Southern. The Association's cause was

grounded upon the Commission's failure to make adequate findings under and its violations of Section 5(2)(c)(4) and Section 5(2)(f).[1] (242 F. Supp. at 24.) The issues raised by the Association's separate cause of action were not considered by the lower court in view of its invalidation of the Commission's order on other grounds.

The Judicial Code vests exclusive original jurisdiction of all actions seeking to invalidate any part of a Commission order in United States District Courts consisting of three judges. Only such courts may hear and determine complaints and issue injunctive relief. 28 U.S.C., § 2325, 62 Stat. 970. Section 1253 of Title 28 provides this Court with appellate authority in those cases in which an injunction has issued or has been refused under 28 U.S.C., § 2325. There is no statutory authority to support a theory of original jurisdiction in this Court to hear and determine complaints seeking to restrain the enforcement of Commission orders. The appellant railroads would have this Court exercise such jurisdiction by passing on the additional questions presented.

B. Lack of Conformity to Revised Rules

The additional questions presented by appellant railroads do not meet the requirements of Rule 15, 1(f). Indeed, appellants make no claim that the additional questions are substantial.

Finally, it has been the consistent practice of this Court to refuse review of an administrative record in

[1] The Association's complaint also adopted by reference those paragraphs of the Florida East Coast complaint that the court below passed on.

the first instance and, when reversal is required, to remand to the lower court for further appropriate proceedings. *United States* v. *Great Northern Railroad Co.*, 343 U.S. 562, 578 (1962). Cf. *United States* v. *Rice*, 327 U.S. 742, 747 (1946); *United States* v. *Classic*, 313 U.S. 299, 309 (1941).

For the aforestated reasons, it is respectfully submitted that the appeal of railroad appellants should be dismissed insofar as it seeks review and reversal of questions not passed on below and in the event the Court notes probable jurisdiction such issues should be explicitly excluded from consideration by the Court.

2. THE QUESTION PRESENTED IS MANIFESTLY SO UNSUBSTANTIAL AS TO NEED NO FURTHER ARGUMENT

The question presented by this appeal is not substantial because the court below properly, and quite logically, applied the rulings of this Court to the Commission's decision and found that decision wanting. The lower court has found that the Commission must set forth meaningful findings based upon judicially measurable guidelines in accommodating the antitrust laws and Section 5(2) of the Interstate Commerce Act. The lower court held that the Commission failed to do this and therefore its order approving the merger of Coast Line into Seaboard is invalid. In reaching this conclusion the court below confirmed the positions taken before it by the United States, the railroad appellees and the Association.

It is apparent from the contents of the Jurisdictional Statements of the Commission and the railroad appellants that they misread the lower court's decision in this case. The lower court does not hold that antitrust laws *govern* the disposition of a merger case under

Section 5(2) and that, therefore, mergers must be measured by the standards of the antitrust laws. Rather, the lower court holds, as did this Court in *Minneapolis & St. L. R. Co.* v. *United States,* 361 U.S. 173, 186 (1959), that Section 5(2) and the antitrust laws must be accommodated. This Court's holding in the *Minneapolis* case cannot mean, contrary to the end result compelled by the arguments of appellants, that Commission "expertise" becomes unquestionable Commission "omniscience" or that the Commission must be considered an intuitive seer regarding the antitrust implications of a railroad merger and is thereby excused from accommodating antitrust legislation and Section 5(2) in a realistic and meaningful manner.

Indeed, as this Court has held, the Commission must "estimate the scope and appraise the effects of the curtailment of competition which will result" (361 U.S. at 186) from approval of any merger case arising under Section 5(2). But this Court did not intend that the estimate and appraisal required of the Commission could take the form of generalized conclusory statements arrived at without the application of criteria which are material to a determination of the effects of the curtailment of competition. The lower court has merely implemented this Court's decision in the *Minneapolis* case in the only practicable manner by holding that the "estimate and appraisal" must be reached by the use of antitrust criteria followed by a conclusion as to consistency with the public interest viewed in relation to the requirements of the National Transportation Policy and Section 5(2). We respectfully submit the lower court was eminently correct in this holding and should be affirmed summarily.

Nor does the lower court hold, as is seemingly claimed by appellants, that antitrust law criteria should be em-

ployed merely to determine whether a particular merger would violate the antitrust laws for, as the Commission states (Commission Jurisdictional Statement, p. 18), it is an "obvious fact that mergers of railroads which compete to any significant extent almost invariably . . . violate the antitrust laws". It is the *extent* of the violation and not its mere existence which is vital to the required accommodation and a realistic conclusion as to the merger's consistency with the public interest. The extent of the violation of antitrust legislation can be determined only by the utilization of criteria developed in the application of that legislation. It cannot be determined by the use of sweeping conclusory statements used by the Commission in this case (see e.g., 320 I.C.C. at 167).

It is only through the knowledge acquired by the application of antitrust legislation criteria that the Commission can determine the violence which will be done to the antitrust policy of this nation by approval of a merger of competing railroad companies and whether that violence is of a character consistent with the public interest when viewed in relation to the National Transportation Policy. It is only with this knowledge that the Commission can "estimate the scope and appraise the effects of the curtailment of competition" and thereby make a value judgment as to whether it should approve a merger. It is only with this knowledge as described in administrative findings to support the Commission's value judgment that a reviewing court can determine whether antitrust legislation and Section 5(2) have been accommodated as this Court has held they must be.

The Commission and the railroad appellants complain that "interminable delays" (Commission Juris-

dictional Statement, p. 13) and "prolonged and complicated administrative proceedings" (Railroad Appellants Jurisdictional Statement, p. 18) will result if antitrust criteria must be employed to accommodate antitrust legislation and Section 5(2). That this complaint is specious is demonstrated in the motions of Florida East Coast and Southern. In any event such a complaint must be directed to the Congress and not this Court.

Assuming, *arguendo,* the accuracy of appellants' complaint and assuming even further that this Court could grant them relief, it would be inappropriate to do so here. The findings required of the Commission must satisfy the provisions of the law under which it acts in any particular case. Where it is required to accommodate two separate statutes it must make the findings necessary to accomplish that result. It cannot be permitted to utilize the discretion given it by Congress as a cloak in which may lie hidden an erroneous or nonexistent accommodation of our antitrust legislation and Section 5(2). Cf. *United States* v. *Carolina Freight Carriers Corporation,* 315 U.S. 475, 488-489 (1942). In *Burlington Truck Lines* v. *United States,* 371 U.S. 156 (1962), this Court held (371 U.S. at 167):

> "Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, *expertise,* the strength of modern government, can become a monster which rules with no practical limits on its discretion'." (Emphasis the Court's.)

The lower court has placed upon administrative action in this case no more strict and demanding requirements than necessary to accomplish the effective accommodation of Section 5(2) and the antitrust laws.

The Jurisdictional Statements of the appellants clearly hold to the proposition that the "expertise" of the Commission should not be fettered by the necessity of setting forth meaningful findings to support its conclusions. The appellee Association disagrees with that proposition as did the court below. We respectfully submit that the lower court's requirement that the Commission must utilize realistic measurable criteria is sound and should be affirmed summarily.

Respectfully submitted,

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